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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 JUAN A. PORTILLO,

12 Petitioner,

13 vs.

14  
15 VICTOR M. ALMAGER, Warden,

16 Respondent.

CASE NO. 08cv0706-LAB (JMA)

**ORDER ADOPTING REPORT  
AND RECOMMENDATION;  
GRANTING MOTION TO STAY;  
AND DENYING WITHOUT  
PREJUDICE MOTION TO  
RETURN LEGAL PAPERS**

[Dkt. Nos. 5, 6, & 8]

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18 Petitioner Juan A. Portillo, a state prisoner appearing without the assistance of  
19 counsel, filed a First Amended Petition for a Writ of Habeas Corpus in which he claims the  
20 Board of Parole Hearings violated his due process rights by failing to consider his favorable  
21 evidence when it found him unsuitable for parole. Respondent filed a request to stay  
22 consideration of this parole claim until the Ninth Circuit Court of Appeals issues its *en banc*  
23 decision in *Hayward v. Marshall*, 512 F.3d 536, *pet. for reh'g en banc granted*, 527 F.3d 797  
24 (9th Cir. 2008). The Magistrate Judge recommends that the court grant the stay because  
25 the *en banc Hayward* decision may resolve and clarify relevant issues of law. The  
26 Magistrate Judge notes that the Ninth Circuit has *sua sponte* stayed other appeals that raise  
27 similar due process claims in the parole setting. No objections to the Report and  
28 Recommendation were filed; however, Petitioner subsequently filed an *ex parte* motion

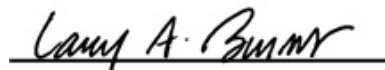
1 requesting that the prison return his legal papers. Petitioner states that his legal papers were  
2 confiscated in August during a "lock down." He states that he is pursuing his administrative  
3 remedies to recover his legal papers and to gain access to the prison law library.

4 Having reviewed the record and the applicable law, the Court **adopts** the  
5 recommendation to stay this habeas petition until the *en banc* panel issues its mandate in  
6 *Haywood*. [# 6] The court agrees that a stay will serve the interests of judicial economy and  
7 that Petitioner will not be prejudiced by the short delay. (The *en banc* panel heard oral  
8 argument in June 2008). Accordingly, the court **grants** the request to stay this habeas  
9 petition. [# 5] Respondent shall promptly notify the court when the mandate issues in the  
10 *Haywood en banc*, and request that the stay be lifted. At that time, the court will set a  
11 briefing schedule.

12 As to Petitioner's complaint that prison officials confiscated his legal papers in August  
13 2008, the court **denies without prejudice** his request for an order instructing the prison to  
14 return those papers. [# 8] If the matter is not resolved through the normal administrative  
15 grievance procedures at the institution by the date the stay is lifted, Petitioner may re-file his  
16 motion at that time. See *Espinoza-Matthews v. California*, 432 F.3d 1021 (9th Cir. 2005);  
17 *Lott v. Mueller*, 304 F.3d 918 (9th Cir. 2002).

18 **IT IS SO ORDERED.**

19 DATED: November 19, 2008

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21 HONORABLE LARRY ALAN BURNS  
22 United States District Judge  
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